85-1193

Supreme Court, U.S.
FILED
JAN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHN S. MAGEE, Individually and
t/a COLLEGIATE RESEARCH SYSTEMS,

Petitioner,

vs.

HAROLD J. RUVOLDT, Prosecutor
of Hudson County,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PHILLIP LEWIS PALEY
Attorney for Petitioner

KIRSTEN, FRIEDMAN & CHERIN
A Professional Corporation
17 Academy Street
Newark, New Jersey 07102
(201) 623-3600

QUESTIONS PRESENTED FOR REVIEW

A. Whether N.J.S. §2A:170-77.16 is unconstitutionally vague, overly broad, and invalid.

B. Whether Petitioner's rights to equal protection of the laws and due process, as guaranteed by the United States Constitution, have been violated by Respondent's selective enforcement of the law and by his prosecutorial conduct.

C. Whether Petitioner's right to due process of law was violated by an adjudication that Petitioner had acted in contempt of a prior restraint, which adjudication was based on insufficient evidence.

TABLE OF CONTENTS

Appendix Index i

Table of Authorities ii

Opinions Below 1

Jurisdiction 1

Statutes Involved 2

Statement of the Case 2

Reasons for Granting the Petition . . . 9

I. THIS COURT SHOULD GRANT THE PETITION TO DECLARE INVALID A VAGUE AND OVERLY BROAD STATUTE WHICH LIMITS EXPRESSION. . 10

II. THIS COURT SHOULD GRANT THE PETITION TO REDRES THE DENIAL OF EQUAL PROTECTION OF THE LAWS EMANATING FROM THE SELECTIVE AND ARBITRARY ENFORCEMENT OF THE LAW BY RESPONDENT 12

CONCLUSION 16

APPENDIX INDEX

	Page
Orders:	
Order of Judgment of Contempt, Superior Court of New Jersey, dated February 1, 1984 Docket No. C-1571-83	1a
Order, Superior Court of New Jersey, Chancery Division, dated February 23, 1984 Docket No. C-1571-83	4a
Opinion, Appellate Division, Superior Court of New Jersey, decided, August 5, 1985 Docket No. A-3996-83T2 Docket No. A-3617-83T2	8a
Order denying Certification, Supreme Court of New Jersey, dated August 15, 1985 Docket No. 24,514	27a

TABLE OF AUTHORITIES

Page

Cases:

Burdenkircher v. Hayes,
434 U.S. 357 (1978) 12

Joseph Burstyn, Inc. v. Wilson
343 U.S. 495 (1957) 9

Coates v. Cincinnati,
402 U.S. 611 (1971) 11

Erzoznick v. City of Jacksonville,
422 U.S. 205 (1975) 11

Freedman v. Maryland,
380 U.S. 51 (1968) 15

Hoffman Estates v. Flipside, Hoffman Estates,
455 U.S. 489 (1982) 11

Lovell v. Griffin,
303 U.S. 444 (1938) 9

Martin v. Struthers,
319 U.S. 141 (1943) 9

Police Department of the City of Chicago v. Mosely,
408 U.S. 92 (1972) 12

Procunier v. Martinez,
416 U.S. 396 (1974) 9

Schad v. Borough of Mount Ephraim,
452 U.S. 61 (1981) 9

Sherman v. United States,
356 U.S. 369 (1958) 13

TABLE OF AUTHORITIES
continued

	Page
Cases:	
Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)	9
United States Constitution	
First Amendment	9
Fifth Amendment	9
Fourteenth Amendment . . .	9
28 U.S.C. §1257(c)	1
N.J.S. 2A:170-77.16	1,2,3,9

Pursuant to Rule 28.4(c), this shall constitute a recitation that 28 U.S.C. Section 2403(b) may be applicable.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHN S. MAGEE, Individually and
t/a COLLEGIATE RESEARCH SYSTEMS,

Petitioner,

vs.

HAROLD J. RUVOLDT, Prosecutor
of Hudson County,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NEW JERSEY

John S. Magee, individually and trading as Collegiate Research Systems, hereby respectfully petitions for a writ of certiorari to review a Judgment of the Supreme Court of New Jersey.

STATUTES INVOLVED

N.J.S. §2A:170-77.16 provides:

> No person shall, for any fee, or other remuneration, prepare, offer to prepare, cause to be prepared, sell or offer for sale any term paper, thesis, dissertation, essay, report or other written, recorded, pictorial, artistic or other assignment knowing, or under the circumstances having reason to know, that said assignment is intended for submission either in whole or substantial part under a student's name in fulfillment of the requirements for a degree, diploma, certificate, course or courses of study at any university, college, academy, school, or other educational institution.

STATEMENT OF THE CASE

The defendant, John S. Magee, trading as Collegiate Research Systems, (herein "Petitioner"), is a resident of New Jersey engaging in the business of providing written research material to customers. The plaintiff, Harold J. Ruvoldt (herein "Respondent") is the Prosecutor of the County of Hudson, State of New Jersey.

In 1977 the New Jersey State Legislature

enacted N.J.S. 2A:170-77.16 (herein: "the statute"), which is quoted in full above. In summary, the statute penalizes those who provide research materials if the provider knows, or has reason to know, that the recipient intends to submit the material to an educational institution for academic credit.

Since 1973, Petitioner has been engaged in the business of preparing and selling research materials. Petitioner employs a staff of authors which prepares papers to order; he maintains an extensive collection of research articles. Petitioner's customers include individuals and corporations engaged in private enterprise, governmental officials, public interest groups, and academia. For a fee, the Petitioner produces a paper addressing virtually any subject, at a level of sophistication and intensity as required by the customer. Petitioner's business is virtually identical to nationally recognized research services, such as the

Encyclopedia Britannica Research Service, The Collier Encyclopedia Reference Service, and others.

After the statute was adopted, Petitioner required each customer to sign a statement disclaiming any intent to use the material for a prohibited purpose. Furthermore, the Petitioner posted a sign at his place of business, providing as follows:

> "Collegiate Research Systems operates as a Publisher and distributor of educational source material. The material we provide is intended to provide the reader with background and source material on a given topic. All appropriate State Laws and University Rules and Regulations regarding the proper use of research materials should be strictly adhered to."

Petitioner was involved with no legal proceedings brought under the statute until March, 1983, when Respondent caused two investigators to order and purchase research papers from Petitioner. Both investigators, full time employees of the Hudson County Prosecutor's office, were equipped with hidden

recording devices; neither was a student intending to use the research paper for credit; neither identified himself as a student; neither represented that he intended to submit the research material for educational credit.

The first investigator concluded that the research paper which he received was insufficient to justify educational credit without substantial modification. The second investigator, following his review of his material, concluded that the materials received did not constitute a violation of the statute, in and of themselves, but that Petitioner's use of a particular order form reflected Petitioner's knowing violation.

Based upon these investigations, the Respondent, on April 13, 1983, filed a Verified Complaint in the Superior Court of New Jersey, alleging that Petitioner had sold research papers with reason to know that the purchasers intended to submit those papers to

an educational institution for academic credit. On May 4, 1983, an interim restraint was entered, enjoining Petitioner from violating the statute.

Thereafter, Respondent caused another investigator employed by his office to order research materials from the Petitioner in an attempt to demonstrate a violation of the interim restraint of May, 1983. During November, 1983, the investigator communicated with Petitioner to obtain research materials. This third investigator did not identify himself as a student; was not a student; specifically identified himself as a writer attempting to do an original research paper on heroin; did not refer to the research paper as a term paper; did not use the word "assignment". The investigator was equipped with a hidden recording device. In January, 1984, this investigator testified that he did not feel that the research materials received were of sufficient elucidation or sophis-

tication to be submitted for educational credit; he considered the paper to be only a starting point. At that hearing, Petitioner presented expert testimony that the material provided this third investigator was only a capsule piece of research in outline form, similar in concept to subject outlines available at book stores.

Petitioner was found to have violated the interim restraint of May, 1983, and was adjudicated in contempt of that restraint and sentenced to serve 5 days in the Hudson County Jail and to pay a $500.00 fine. This sentence was stayed pending Petitioner's State appeals; the custodial sentence has now been served and the fine now paid.

On February 15 and 16, 1984, the underlying case was tried in the Superior Court of New Jersey; Petitioner was found guilty of two civil violations of the statute

and fined $2,000, as well as being permanently enjoined from further violations thereof.

Subsequently, Petitioner filed an appeal to the Appellate Division of the Superior Court of New Jersey; on August 5, 1985, that court affirmed both the order of contempt and the February 24, 1984 judgment. Petitioner then sought Certification to the Supreme Court of New Jersey, which denied the application during October, 1985.

Petitioner raised the issue of the validity of the statute on First Amendment grounds, and the issue of the impropriety of the actions of the Prosecutor as violative of due process, in his answer to the original Complaint; all issues were pursued throughout the Trial and Appeal, as is apparent from the Appellate Division decision constituting part of the Appendix herein.

REASONS FOR GRANTING THE PETITION

Petitioner respectfully urges this Court to address the substantial deprivation of Petitioner's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. The deprivation results from decisions of New Jersey courts that (a) Petitioner violated N.J.S. §2A:170-77.16 [the statute] on two occasions and (b) Petitioner violated a restraint entered pendente lite by the trial court.

Here, a County Prosecutor sued civilly, seeking to enjoin Petitioner from selling or offering to sell research materials (term papers, reports and the like) with knowledge, read or imputed, that the materials were intended for submission to an educational institution by a student for credit.

Initially, Petitioner contends that the production of research materials are within the ambit of First Amendment protections, Cf. Lovell v. Griffin, 303 U.S. 444, 450 (1938); Martin v. Struthers, 310 U.S. 141, 143 (1930). Petitioner, although engaged in a business organized for profit, is entitled to the full extent of those protections of speech and expression guaranteed by the First Amendment. Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 761 (1976); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1957).

I. THIS COURT SHOULD GRANT THE PETITION TO DECLARE INVALID A VAGUE AND OVERLY BROAD STATUTE WHICH LIMITS EXPRESSION.

Petitioner contends that the statute reaches substantially further than is necessary to protect legitimate governmental interests, Procunier v. Martinez, 416 U.S. 396, 413 (1974); improperly intrudes on freedom of expression, Schad v. Borough of

Mount Ephraim, 452 U.S. 61 (1981); and has encroached upon rights of expression by other than the least restrictive means, Erzoznick v. City of Jacksonville, 422 U.S. 205 (1975). Although these contentions are addressed to the facial invalidity of the statute, Petitioner further argues that the application of the statute to research material other than a finished product suitable for submission to an academic institution for credit is inappropriate and expressly contravened by decisions of this Court (Erzoznick, supra).

Furthermore, particularly as interpreted by the state courts, the statute is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Coates v. Cincinnati, 402 U.S. 611, 614 (1971). The statute requires Petitioner to reach conclusions as to the undisclosed intent and motivation of third persons. This is an impermissible standard, Cf. Hoffman Estates v. Flipside, Hoffman

Estates, 455 U.S. 489 (1982), because the statute does not provide fair warning as to how one is to gauge the undisclosed intent. No standards, guidelines, or factors are contained within the statute permitting any person to draw conclusions as to the unexpressed intention of a customer; therefore, the statute should be deemed invalid.

II. THIS COURT SHOULD GRANT THE PETITION TO REDRESS THE DENIAL OF EQUAL PROTECTION OF THE LAWS EMANATING FROM THE SELECTIVE AND ARBITRARY ENFORCEMENT OF THE LAW BY RESPONDENT.

Petitioner contends that Respondent's actions in conducting its investigations and prosecuting its suit at trial reflects discretionary enforcement exercised pursuant to an arbitrary classification, in violaton of Petitioner's constitutional right to the equal protection of the laws. See Burdenkircher v. Hayes, 434 U.S. 357, 364 (1978); Police Department of the City of Chicago v. Mosely, 408 U.S. 92 at 96 (1972).

Clearly, when communicative activity is sought to be suppressed or limited by government, the limiting actions of government should be subjected to demanding and harsh scrutiny to ensure that those actions are not undertaken in an unfairly selective manner. Thus, there exists impermissible inequity when the Respondent, County Prosecutor, elects to proceed against a small business while ignoring the national and multinational entities (as Encyclopedia Britannica) who engage in the same activity.

Petitioner further contends that the actions of Respondent's investigators, full-time employees of the Office of the County Prosecutor, effected an entrapment; the conduct of Petitioner was clearly the product of the creative activity of the law enforcement officials, see Sherman v. United States, 356 U.S. 369 (1958), thus constituting a violation of due process. The lower courts clearly erred in ignoring the failure of

the investigators to have identified themselves as students and the ambiguous language used by the investigators in specifying their intent, among other things. The conduct of the investigation reflects an impermissible level of participation by Respondent and his agents, acting on behalf of the State.

For these reasons, Petitioner argues that the State courts erred in finding his actions violative of the statute, to the prejudice of his constitutionally guaranteed rights.

Petitioner also appeals his adjudication of contempt, reflected in the February 1, 1983, Order. Basically, the trial court (through a different Judge) concluded that evidence substantially similar in nature to that presented on the case in chief, derived in an identical manner, was sufficient to show

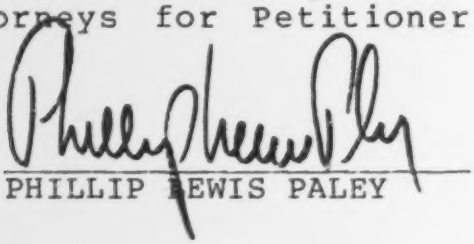
a violation of the statute (and an interim restraining Order effectively tracking the statutory language). Therefore, to the extent that the basic adjudication is invalid, the contempt finding must fall. In addition, Petitioner respectfully contends that, under any standard, insufficient evidence was presented to justify a finding of contempt, particularly in the context of a First Amendment deprivation, where the burden of proof is invariably placed on parties seeking to impose any prior restraint. Freedman v. Maryland, 380 U.S. 51 (1968).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted by this Honorable Court.

Respectfully submitted,

KIRSTEN, FRIEDMAN & CHERIN
A Professional Corporation
Attorneys for Petitioner

By: 
PHILLIP LEWIS PALEY

Dated: January 9, 1986

HAROLD J. RUVOLDT, JR.,
Prosecutor of Hudson County
Administration Building
595 Newark Avenue
Jersey City, NJ 07306
(201) 795-6400

SUPERIOR COURT OF
NEW JERSEY
HUDSON COUNTY
CHANCERY DIVISION
DOCKET NO. C1571-83

IN THE MATTER OF JOHN S. :

MAGEE, CHARGED WITH :

CONTEMPT OF COURT.

Civil Action

ORDER OF JUDGMENT
OF CONTEMPT

This matter having come before the Court on an Order to Show Cause why John S. Magee should not be held in contempt in the presence of James E. Flynn, Esq., First Assistant Prosecutor, attorney for the Plaintiff, and Edward F. Clark, Esq., (Sciarra & Clark, Esqs.) attorney for the Respondent John S. Magee; and the Court having conducted a non-jury trial of this matter on January 17,

1984 and January 25, 1984; and the Court having considered the testimony, exhibits, briefs and arguments of counsel; and the Court having found beyond a reasonable doubt that John S. Magee was in willful contempt of the prior Order of the Honorable Robert E. Tarelton, J.S.C. of May 4, 1983; and good cause appearing;

IT IS on this day of February, 1984,

ORDERED that judgment be entered for the reasons stated by the Court in its oral opinion on January 25, 1984 as follows:

1. Adjudging that John S. Magee be found guilty of contempt of Court in that he willfully violated the prior Order of the Honorable Robert E. Tarelton entered on May 4, 1983 in the matter of Ruvoldt v. Magee, Superior Cuort of New Jersey, Chancery Division, Docket No. C1571-83;

2. Further Ordered that the Respondent John S. Magee be sentenced to a term of

five days in the Hudson County Jail and pay a fine of $500.00 together with the costs of this action forthwith.

/s/ Gregory J. Castano
GREGORY J. CASTANO, J.S.C.

HAROLD J. RUVOLDT, JR.,
Prosecutor of Hudson County
Administration Building
595 Newark Avenue
Jersey City, NJ 07306
(201) 795-6400

SUPERIOR COURT OF NEW
HUDSON COUNTY
CHANCERY DIVISION
DOCKET NO. C1571-83

HAROLD J. RUVOLDT, JR., Prosecutor of Hudson County, Plaintiff, vs. JOHN S. MAGEE, INDIVIDUALLY and t/a COLLEGIATE RESEARCH SYSTEMS, Defendant.	Civil Action ORDER

This matter coming on for non-jury trial before the Court on February 15 and 16,

1984 and the Court having considered the testimony, exhibits, briefs and arguments of counsel and good cause appearing and for the reasons stated in the Court's oral opinion of February 23, 1984,

It is on this day of February, 1984, ORDERED that Judgment be entered as follows:

1 On the First Count of the Amended Complaint finding the defendant, John S. Magee, individually and T/A Collegiate Research Systems guilty of a civil offense in violation of N.J.S. 2A:170-77.16 in the sale of two papers to Investigator Anthony Scott on March 29, 1983; and imposing a fine of $1,000.00 on said defendant for this offense;

2. On the Second Count of the Amended Complaint finding the defendant John S. Magee, individually and T/A Collegiate Research Systems guilty of a civil offense in violation of N.J.S. 2A:170-77.15 in the sale of a paper to Investigator Donald Wiggins

between March 24 and April 11, 1983 and imposing a fine of $1,000 on said defendant for this offense.

3. The above imposed fines, totalling $2,000.00 shall be paid to the Clerk of Hudson County on the following schedule:

$400.00 on or before March 1, 1984.
$400 00 on or before March 8, 1984;
$400.00 on or before March 15, 1984;
$400.00 on or before March 22, 1984; and
$400.00 on or before March 27, 1984.

4. On the Third Count of the Amended Complaint, a judgment is entered granting a permanent injunction ordering that the defendant, John S. Magee, individually and T/A Collegiate Research Systems, and his agents, servants and employees are hereby enjoined and restrained from preparing, offering to prepare, selling or offering for sale any term paper, thesis, dissertation, essay, report or other written, recorded, pictorial, artistic or other assignment knowing or under circumstances having reasons

to know that said assignment is intended for submission either in whole or in substantial part, under a student's name in fulfillment of the requirements for a degree, diploma, certificate, course or courses of study at any university, college, academy school or other educational institution for any fee or other remuneration.

5. Defendant's application for a stay of this Judgment is denied for the reasons expressed by the Court on February 23, 1984.

/s/ Robert E. Tarleton
ROBERT E. TARLETON, J.S.C.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2996-83 T2
A-3617-83T2

HAROLD J. RUVOLDT. JR.,
PROSECUTOR OF HUDSON
COUNTY,
Plaintiff-Respondent,

v.

JOHN S. MAGEE, INDIVIDUALLY
and t/a COLLEGIATE RESEARCH
SYSTEMS,

Defendant-Appellant.

IN THE MATTER OF JOHN S. MAGEE
CHARGED WITH CONTEMPT OF COURT

Argued June 12, 1985 - Decided Aug. 5, 1985

Before Judges Matthews, Furman and Havey.

On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County.

Edward F. Clark, argued the cause of appellant (Mr. Clark on the brief).

Charles D'Amico, Assistant Prosecutor argued the cause for respondent (Harold J. Ruvoldt, Jr., Prosecutor of Hudson County, attorney; James E. Flynn, First Assistant Prosecutor on the brief).

Mark Fleming, Deputy Attorney General, argued the cause for the State of New Jersey (Irwin I. Kimmelman, Attorney General of the State of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Mr. Fleming on the brief).

PER CURIAM

Plaintiff, in his capacity as prosecutor of the County of Hudson, filed a verified complaint on April 13, 1983 against defendant, alleging that defendant had and continud to violate the provisions of N.J.S.A. 2A:170-77.16 by preparing and selling term papers to students "well knowing or under circumstances where [defendant] had reason to know that [the] term papers. . . were intended to be submitted. . ." by the students in fulfilment of requirements for a high school or college course of study. N.J.S.A. 2A:170-77.18 provides for the imposition of fines as

well as injunctive relief for violations of the act On May 4, 1983, Judge Tarleton issued a preliminary injunction restraining defendant from engaging in conduct proscribed by N.J.S.A. 2A:170-77.16.

On January 9, 1984, Judge Tarleton issued an order to show cause why defendant should not be held in contempt for violating the restraint for allegedly selling term papers to an undercover agent between November 30 and December 27, 1983. Judge Costanzo found the defendant guilty of contempt and sentenced him to five days in the county jail and fined him $500.

After a nonjury trial in the underlying action, Judge Tarleton found that defendant had violated the act by selling term papers on two occasions, imposed two $1,000 fines and issued a permanent injunction against future violations of the act.

On these consolidated appeals, defendant challenges both the judgment of

conviction in the underlying action, the preliminary injunction, as well as the conviction for contempt. [1] With respect to his conviction for violating N.J.S.A. 2A:170-77.16, he argues that the statute is an unconstitutional infringement of his First Amendment right of free speech and violates his substantive and procedural due process rights because it is overbroad and too vague. He also alleges selective enforcement of the statute against him and that he was entrapped into violating the act. As to his contempt conviction, defendant challenges the underlying preliminary injunction as constituting an invalid prior restraint and as being imper-

---

1

On May 5, 1983, defendant's motion for leave to appeal and to stay the preliminary injunction pending appeal was denied. Defendant's application for leave to appeal to the New Jersey Supreme Court was also denied on May 7, 1983. Defendant's appeal from the contempt proceeding is under docket number A-3617-83 T2. Defendant's appeal from his conviction in the underlying action is under docket number A-2926-83 T2.

missibly vague. He also argues that (1) the trial court lacked personal jurisdiction over him; (2) the statute does not authorize injunctions prior to conviction and (3) that the contempt proceedings failed to provide him with adequate safeguards. We affirm both convictions.

The evidence presented by plaintiff during the trial of the underlying complaint established that defendant operated a business in Hoboken known as Collegiate Research Systems, which provided "research, writing, editing, resumes and other business research services." On March 24, 1983 Investigator Donald Wiggins of the Hudson County Prosecutor's Office visited defendant's business wearing a hidden tape recorder. Wiggins advised defendant that he needed "a 15-page original research paper." With the aid of defendant, Wiggins filled out an order form which requested the following information: subject, number of pages, due date, level

(undergraduate advanced undergraduate or graduate), bibliography and footnotes. Wiggins requested a double-spaced, typed report on nuclear arms control. The paper was prepared in a typical term-paper form entitled "The Historic Background of the Arms Race," containing a bibliography and footnotes. The paper did not contain the author's name, the purpose for which it was prepared or defendant's logo. Wiggins paid defendant $225 for the paper.

On March 29, 1983 a second investigator, Anthony Scott, also wearing a body recorder, visited defendant's business and purchased two term papers which defendant had on file. Defendant advised Scott to buy two and "combine the two of them." When Scott asked defendant if there were "any problems with this" and whether he could "hand these right in," defendant responded "well, I don't care anything what you're going [sic] with it. . . you know, I'm just selling them." Scott paid $70 for the two papers.

Defendant testified that his product was essentially research material, similar to that distributed by other reference services, such as Encyclopedia Britannica Reference Service and the New York University Copy Service. He claimed to be a broker for research and that he never intended that his work product be submitted under a student's name to an educational institution. He testified that the reason for not including the author's name on the papers sold was to prevent his customers from circumventing his service and dealing directly with the author. He estimated that 95% of his customers were college students, whose business he had solicited by advertising in the Village Voice and by distributing his business cards to passers-by near college campuses.

Judge Tarleton concluded that the materials sold by defendant did not constitute commercial-aid studies or research materials and thus did not fall within the catagories of

"assistance" and "research" which are exempt from the proscriptions of N.J.S.A. 2A:17-170-77.16. See N.J S.A. 2A:170-77.17. He concluded that plaintiff had proven beyond a reasonable doubt that defendant had violated the statute on two occasions in that he knew the papers would be submitted under Wiggins's and Scott's names, characterizing defendant's operation as a "term paper mill."

The factual basis for the contempt conviction was provided by the testimony of Hudson County Investigator Terrance Hull who stated that on December 7, 1983 he went to defendant's offices and ordered an original research paper from defendant on the subject of heroin. When Hull expressed concern about the originality of the paper, defendant assured him that the paper was unique and that even if the same topic had been ordered by another student, a different writer would have been assigned. Finding defendant in contempt of the preliminary injunction, Judge Costanzo

concluded that defendant "had to know [,] and did know [,] it [the term paper purchased by Hull] was intended for submission under a student's name in fulfillment of the requirements of a course of study at some educational institution."

Defendant first contends that N.J.S.A. 2A:170-77.16 is an infringement of his constitutionally protected rights of freedom of speech and of the press. He argues that his products are "publications," similar to "books, newspapers, and magazines " entitled to First Amendment protection.

We have no doubt that the regulated activity here the sale or offer for sale of prepared term papers, essays or other assignments, is within the ambit of the free-press and free-speech protections of the First Amendment. The statute inhibits the distribution and dissemination of information, a fundamental First Amendment right. See Lovell v. Griffin, 303 U.S. 444, 452, 55 S.Ct. 666,

82 L. Ed. 949, 954 (1938): Smith v. California, 361 U.S 147, 150, 80 S. Ct. 215 4 L. 2d. 2d 205, 209 (1959) The focus of the statutute, however, is not to regulate "pure speech" but to proscribe speech which is directed to the accomplishment of an end that the State has declared illegal when such expression consists in part of "conduct" or "action." California v. La Rue 409 U.S. 109 117, 93 S. Ct. 390, 34 L Ed 2d 342, 351 (1972); Borough of Collingswood v. Ringgold, 66 N.J. 350, 362-363 (1975). The statute's emphasis on regulating "conduct," while traditionally surrounded with lesser protection than "pure speech," nevertheless, does not remove defendant's activity from the ambit of all First Amendment protection. See Cox v. Louisiana, 379 U.S 546, 555, 85 S. Ct. 453, 465, 13 L. Ed. 2d 471, 484 (1975); Borough of Collingswood v. Ringgold, supra, 66 N.J. at 365-366

If the regulated communicative

activity is constitutionally protected to some degree, the issue becomes whether the regulation is so overbroad in proscribing the constitutionally protected activity, that it reaches farther than is permitted or necessary to fulfill the State's interest. See State v. Lee, 96 N.J. 156, 165 (1984); Town Tabacconist v. Kimmelman, 94 N.J. 85, 125 n. 21 (1983; In re Hinds, 90 N J. 604, 617-618 (1982). A regulation which restricts time, place or manner of protected free speech will survive constitutional scrutiny only if it: (1) may be justified without reference to the content of the regulated speech; (2) it serves a significant governmental interest by the least restrictive possible means; and (3) it provides for an open ample alternative means for the communication of the information. Erzoznik v. City of Jacksonville 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975); State v. Miller, 83 N.J. 402, 412 (1980); Capitol Movies, Inc. v. City of Passaic, 194 N.J. Super. 298, 303 (App. Div. 1984).

Applying that three-prong test here, we are persuaded that N.J.S.A. 2A:170-77.15 is not facially overbroad. The statute prohibits the sale or offer for sale of academic assignments, regardless of content or subject matter, only when the distributor knows or has reason to know that the assignment is intended for submission under the student's name for academic credit. Second, it clearly advances a compelling governmental interest: combatting blatant, commercialized assistance in cheating that subverts the integrity of the educational system. See Ambash, "Trapping Term Paper Cheaters by Statute: 59 A.B.A.J. 162, 165 (1973). Finally, N.J.S.A. 2A:170-77.17 provides an adequate means of disseminating research material or other academic information which is not intended for submission under the student's name to an educational institution. We therefore reject defendant's "overbroad" constitutional challenge.

Defendant's vagueness challenge is

bottomed on the assertion that the phrase "...knowing, or under the circumstances having reason to know..." [emphasis suplied], impermissibly imposes criminal liability based upon the student's state of mind, and not upon defendant's intent, requiring the seller to make a subjective determination regarding the student's mens rea. But Judge Tarleton found that defendant had actual knowledge beyond a reasonable doubt that both Wiggins and Scott intended to submit the term papers sold by defendant under their respective names to educational institutions. Because the statute clearly applies to distributors who have actual knowledge of the student's purpose and intent, the vagueness issue need not be addressed since we are satisfied that Judge Tarleton's finding of actual knowledge is supported by sufficient credible evidence in the record. See Donadio v. Cunningham, 48 N.J. 309, 351-326 (1971); State v. Zucconi 50 N.J. 361, 364 (1967); American Bank & Trust

Co. of Pennsylvania v. Lott, 193 N.J. Super. 516, 521 (App. Div. 1984), certif. granted 97 N.J. 618 (1984); cf. Ashton v. Kentucky, 384 U.S 195, 198, 86 S. Ct. 1407, 17 L. Ed. 2d 469, 471-472 (1966)

The requirement that a seller must "know" that the assignment sold will be used by a student under his name is satisfied if he is "practically certain" that the paper will be so used. See Town Tabacconist v. Kimmelman, supra, 94 N.J. at 112; N.J.S.A. 2D:2-2 (b)(2). The clear implication of Wiggins's and Scott's conversations with Magee during the transactions and the urgency of their requests for the term papers, as well as the overall format of the typewritten pages, with footnotes and bibliographies, prepared for direct submission to the education institution, amply supports a finding that defendant was "practically certain" that the papers would be submitted by Wiggins and Scott as their own work product.

There is no factual basis in the record to support defendant's contention that his rights to equal protection were violated by plaintiff based on selective enforcement of N.J.S.A. 2A:170-77.16 against him. To prevail on a "selective enforcement" challenge, defendant must demonstrate that the State's choice to prosecute him was "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." State v. Sutton, 80 N.J., 110, 121 (1979). There was absolutely no showing that the investigation of defendant's enterprise and his prosecution was based on some arbitrary or invidiuous classification.

Nor do we find a factual basis in the record to support defendant's contention that he was entrapped into violating the act. We are unable to conclude that defendant proved by a preponderance of the evidence that the investigators' conduct in ordering and purchasing the term papers created a substan-

tial risk that violations of the fact would be committed by defendant and that defendant was not otherwise predisposed to commit them. See State v. Rockholt, 96 N.J. 570, 577 (1984); N.J.S.A. 2C:2-12(a)(2)

Defendant's first challenge to his contempt conviction is that the preliminary injuction was impermissibly vague and an invalid prior restraint on protected First Amendment rights. But "a party cannot on an appeal from a judgment of conviction of contempt assert that the court order which he had contemned was based on error of law or fact, but rather the contemnor's recourse is to take a direct appeal from the court's order." In re Tiene, 17 N.J. 170, 177 (1954); see also Walker v. Birmingham, 388 U.S. 307, 320, 87 S. Ct. 824, 18 L. Ed. 2d 1210, 1219 (1967); Matter of Felmeister, 95 N.J. 431, 444-446 (1984); In re Contempt of Carton, 48 N.J. 9, 16-17 (1966); State, In re Contempt of Frankel, 119 N.J. Super. 579, 581 (App. Div.

1972): certif. den. 62 N.J. 75 (1972), cert. den 409 U.S. 1125 (1973).

Here while defendant sought leave to appeal the injunctive order (which was denied) the thrust of his argument before us for leave was based on procedural deficiencies in the manner by which the injunctive order was obtained by plaintiff, including the lateness of service of the verified complaint upon defendant, and not on constitutional grounds. We therefore view the substantive issues now presented as being untimely raised.

We also reject defendant's contention that the trial court lacked personal jurisdiction over him since he was not served with a copy of the complaint within the time mandated by the order to show cause of R. 4:52-1. Defendant was timely served with the order but, inadvertently, not with the verified complaint within the ten-day period prescribed by R. 4:52-1(b). Deficiences in

the issuance and service of a summons under R. 4:4-1 do not preclude personal jurisdiction of the court, Rogers v. Dubac, 52 N.J. Super. 360, 364 (Law Div. 1958), but may support a basis for dismissal of the action under R. 4:37-2(a). The complaint, while not served with the order to show cause, was served upon defendant on April 27, 1983, seven days before the return date of the order. Absent here is any showing of prejudice to defendant as a result of the late service of the verified complaint. See Byrd v. Ontario Freight Lines Corp., 39 N.J. Super. 277 (App. Div. 1956) Vines v. Orange Memorial Hospital, et al., 192 N.J. Super. 496, 498-499 (App. Div. 1984), remanded 93 N.J. 254 (1984). Defendant's challenge on personal jurisdiction grounds is therefore rejected.

We have carefully considered the remaining contentions raised by defendant in the context of the record of the contempt proceedings and underlying trial and are

satisfied that they are completely without merit. R. 2:11-3(e)(2) In re Buehrer, 50 N.J. 501 (1967); In re Yengo 84 N.J. 111 (1980).

Affirmed.

BEST AVAILABLE COPY

SUPREME COURT OF NEW JERSEY
C-199 SEPTEMBER TERM 1985

24,514

HAROLD J. RUVOLDT, JR., PROSECUTOR OF HUDSON COUNTY, Plaintiff-Respondent,	:	
vs.	:	ON PETITION FOR CERTIFICATION
JOHN S. MAGEE, INDIVIDUALLY and t/a COLLEGIATE RESEARCH SYSTEMS, Defendant-Petitioner.	:	

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2996/3617-83T2 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs and it is further

ORDERED that the appeal in the within matter is dismissed pursuant to R. 2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 15th day of October, 1985.

CLERK OF THE SUPREME COURT